Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

DOMINIC DIGREGORIO,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

DOMINIC DIGREGORIO
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5488

QUESTIONS PRESENTED

WHETHER THE DISTRICT COURT JUDGE, IN SENTENCING THE PETITIONER FOR WEAPONS OFFENSES NOT CHARGED IN THE INDICTMENT, VIOLATED *APPRENDI V. NEW JERSEY*?

WHETHER THE QUANTITY AGGRAVATORS OF 21 U.S.C. § 841 ARE ELEMENTS OF SEPARATE OFFENSES THAT MUST BE CHARGED IN AN INDICTMENT, BOTH AS A MATTER OF STATUTORY CONSTRUCTION AND AS REQUIRED BY *APPRENDI V. NEW JERSEY*?

WHETHER THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE THE INDICTMENT FAILED TO ALLEGE THE REQUIRED ELEMENT OF AN EFFECT ON INTERSTATE COMMERCE?

PARTIES TO THE PROCEEDING

Dominic DiGregorio is presently an incarcerated inmate at the Federal Correctional Institution located at Camp McKean in Bradford, Pennsylvania.

The United States of America is the Government of the United States represented by the Department of Justice.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Dominic DiGregorio, an incarcerated inmate, on behalf of himself respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, 1a-8a) is unreported. The Judgment of Conviction entered by the Honorable Stewart Dalzell, USDJ for the Eastern District of Pennsylvania, on November 17, 2000 is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 11, 2001. The Petitioner filed a timely Petition for Panel Re-Hearing which was denied on November 28, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law."

2. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . and to be informed of the nature and cause of the accusation."

3. The Commerce Clause of the Constitution, Article 1, Section 8, Clause 3, provides: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and within the Indian Tribes."

4. The Controlled Substance Act, 21 U.S.C. §801(5) states: "Controlled substances manufactured and distributed intrastate cannot be differentiated from Controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between Controlled substances manufactured and distributed interstate and Controlled substances manufactured and distributed intrastate."

5. The Act also provides certain definitions and 21 U.S.C. §802(28) states that: "The term 'United States' when, used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States."

6. The relevant portions of 21 U.S.C. §841(b), the drug quantity aggravators are reprinted in the Appendix infra.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, the Petitioner was found guilty on five (5) counts of violating sections of the Controlled Substance Act. Petitioner was sentenced

to 100 months in custody with five years supervised release, a $25,000 fine, and an assessment of $500.00.

1. On March 17, 1999 a Grand Jury indicted the Petitioner, a 63 year old grandfather, with no prior criminal history, with seven (7) separate counts of criminal conduct in violation of 21 U.S.C. §846 (conspiracy to manufacture and distribute methamphetamine); 21 U.S.C. §841(a)(1) (distributing methamphetamine); 21 U.S.C. §841(a)(1) (possession of P2P with intent to manufacture methamphetamine); 21 U.S.C. §841(d)(1) (possession of monomethylamine with intent to manufacture methamphetamine); and 18 U.S.C. §2 (aiding and abetting). (App, infra, 9a-23a).

2. The jury was specifically instructed that the Government was not required to prove the drug amounts recited in the indictment. (App., infra, 27a-28a).

3. The jury acquitted the Petitioner of one count of Possession and aiding and abetting, and one count of distributing methamphetamine, but found Petitioner guilty on all other counts of the indictment.

4. The PreSentence Report contained enhancements relating to not only acquitted conduct, but for possession of a dangerous weapon. The Petitioner's sentence was enhanced because of the presence of the weapon at the time of the Government's seizure of drugs at Petitioner's home. The weapons charges were not contained in the indictment.

5. The Petitioner timely filed a Notice of Appeal with the Third Circuit Court of Appeals on November 24, 2000.

6. The Petitioner raised a number of issues relying on *Apprendi v. New Jersey*. They included the failure of the indictment to contain: (1) the drug quantity aggravators in the penalty provisions of the Controlled Substances Act (21 U.S.C. §841(b)), and (2) the weapons violations. These issues were not addressed by the Third Circuit.

7. After the Third Circuit rendered its opinion, the Petitioner filed a timely Petition for Panel Rehearing addressing those issues which had been overlooked and argued, that there had been a misapplication of the legal precedents recited by the panel in affirming the Judgment of Conviction. The Petition for Rehearing was denied on November 28, 2001. (App., infra, 24a).

8. The Third Circuit's affirmance of the Judgment of Conviction was premised on the rejection of the Petitioner's argument that the indictment failed to allege an essential element of the drug offenses, namely, that there was an affect on interstate commerce. The Third Circuit contended that Petitioner relied "on a strained interpretation of the Commerce Clause and [this] Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995)."

REASONS FOR GRANTING THE PETITION

The Third Circuit refused to address the issue that Petitioner raised that the failure to allege any weapons charges in the indictment precluded any sentencing enhancement for that charge under the rationale of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In addition, the Government's omission of the drug quantity aggravators of 21 U.S.C. §841 from the indictment violated Petitioner's constitutional rights.

Finally, the indictment in the instant case was constitutionally infirm because the indictment did not allege the essential element of an affect on interstate commerce to enable the Lower Court to assert Federal Subject Matter Jurisdiction.

There is an unbroken line of authority from this Court which has held that the power of a Federal Court to sentence a Defendant is limited to the offenses charged by the Grand Jury. Further, as a Constitutional matter the drug quantity aggravators of 21 U.S.C. §841 are elements of separate offenses that must be charged in the indictment, both as a matter of statutory construction and as required by *Apprendi*.

Finally, under the rationale adopted by this Court in *United States v. Lopez*, 514 U.S. 549 (1994), the Third Circuit opinion is in conflict because the indictment failed to allege the essential element of an affect on interstate commerce, thereby precluding subject matter jurisdiction in the Lower Court. This Court's review is warranted.

1. The Petitioner argues that under *Apprendi v. New Jersey*, his Fifth Amendment rights under the Due Process Clause and his notice and jury trial guaranties of the Sixth Amendment were violated because the finding that he was responsible for possession of a dangerous weapon during the crime of violating the Substance Control Act, was not made by a jury "beyond a reasonable doubt."

2. The argument that *Apprendi* applies to a wide range of decisions under the U.S.S.G. is given support by justice O'Connor who wrote in *Apprendi*:

> "The [*Apprendi*] principle thus would apply . . . to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g. the federal Sentencing Guidelines) * * * The Court appears to hold today, however, that a defendant is entitled to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of sentence under a determinate-sentencing scheme." 530 U.S. 146 L.Ed.2d 488-91.

3. The *Apprendi* decision puts into play the issue of where to draw the line between (i) "sentencing factors" which may be determined at the time of sentencing by preponderance of proof standard and (ii) "elements of the offense" which must, pursuant to the Fifth and Sixth Amendments, be properly charged in an indictment or information and be found by a jury beyond a reasonable doubt.

The Fifth Amendment states that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. This prohibition has always included the principle of "paramount" importance: "that every ingredient of the offense must be accurately and clearly expressed; or, in other words: that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." *United States v. Reese*, 92 U.S. 214, 232 (1875), quoted in *Apprendi*, 530

U.S. 466, 147 L.Ed.2d at p. 454-55 fn.15; *accord United States v. Cook*, 84 U.S. 168, 17 Wall 174 (1872).

Moreover, this principle "pervades the entire system of the adjudged law of criminal procedure. . . . we can no more escape from it than from the atmosphere which surr ounds us." *Reese, supra.*, 92 U.S. at p. 232.

The failure of the grand jury to charge a Defendant with the elements of an offense is a jurisdictional bar to prosecution, conviction and sentence for that offense. This principle has been settled by this Court since its decision in *Ex Parte Bain*, 121 U.S. 1, 10-11 (1887). This Court revisited and explicitly reaffirmed *Bain* in *Stirone v. United States*, 361 U.S. 212 (1960). This Court in *Stirone* explained that the very purpose of the Fifth Amendment Grand fury requirement was to limit a defendant's "jeopardy to *offenses charged by a group of his fellow citizens acting independently of either the prosecuting attorney or judge.*" 361 U.S. at p. 218 (emphasis added).

The principle of *Bain* and *Stirone*, that an indictment charging all of the essential elements of the offense is a jurisdictional prerequisite to conviction for that offense, was reaffirmed by this Court in *Russell v. United States*, 369 U.S. 749, 770-71 (1962). In *Russell*, this Court reiterated that an indictment which fails to charge the essential elements of the offense may not be amended or saved by any means other than by vote of the grand jury.

The reasons for this rule have to do with the paramount importance the Framers attached to the independence of the grand jury as a buffer between the government and the individual and a bulwark against prosecutorial overreaching. *United States v. Dionisio*, 410

U.S. 1, 17-18 (1973). The Fifth Amendment bar to prosecution except on an indictment by Grand Jury guarantees far more than the right to notice of the charges. Just as fundamental, if not more, is the grand jury's independence from the government. *United States v. Calandra*, 414 U.S. 338, 342-43 (1974).

Consistent with this precedent, it was therefore error for the Third Circuit to have permitted imposition of a sentence on the weapon's charges which were not contained in the indictment in the instant case.

4. Since a federal court has no power to sentence a defendant for an offense not charged in the indictment, an unauthorized sentence cannot stand on a harmless error theory. Even if the sentence is not jurisdictionally limited to the offense charged by the grand jury, a sentence for a crime never charged in the indictment is quintessential structural error and the harmless error rule announced by this Court in *Neder v. United States*, 507 U.S. 1 (1999) would not apply. However, such an error would necessarily meet the factors in the plain error review recited in *United States v. Olano*, 507 U.S. 725 (1993).

The Circuit Courts of Appeal that have applied the plain error doctrine to *Apprendi* violations have held that such error is plain. *United States v. Nance*, 236 F.3d 820, 835 (7th Cir. 2000); *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000).

In addition, other Circuits have held that an error that increases the defendant's authorized sentence "affects substantial rights." *United States v. Martinez-Rios*,

143 F.3d 662 (2nd Cir. 1998) (sentencing error "undoubtedly affected" substantial rights where it resulted in a longer sentence); *United States v. Robinson*, 2001 WL 475935 (7th Cir. 2001) ("no question" that *Apprendi* error affects substantial rights because it increased the sentence); *United States v. Fields*, 242 F.3d 393, 397 (D.C. Cir. 2001) (*Apprendi* affected "substantial rights" because it "clearly affected the outcome of the case by substantially increasing the defendant's sentences"); *United States v. Velasco-Heredia*, 2001 WL 492349 (9th Cir. 2001); *United States v. Nordby*, 225 F.3d 1053, 1060, 1062 (9th Cir. 2000) (*Apprendi* error that increases sentence affects substantial rights).

In *Nordby*, the 9th Circuit held, the imposition of a sentence for a crime that was never charged by the grand jury is necessarily an error that affects the "fairness, integrity and public reputation of judicial proceedings." *United States v. Nordby*, 225 F.3d at p. 1060.

The Third Circuit decision in the instant case is in conflict with *Apprendi* and the other Circuits who have held that such "plain error" violates a Defendant's Constitutional rights warranting at minimum a remand for re-sentencing.

5. This Court's decisions in *Jones v. United States*, 526 U.S. 227 (1999); *Castillo v. United States*, 530 U.S. 120 (2000); *Carter v. United States*, 530 U.S. 225 (2000) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) make clear that the drug quantity aggravators of 21 U.S.C. §841(b) are elements of separate offenses that must be charged in an indictment.

Under the rule of statutory construction elucidated in *Jones*, *Castillo* and *Carter*, analysis of the text, structure and effect of the statutory language compel the conclusion that the statutory aggravators in §841(b) are elements of separate offenses. This conclusion is required by the holding in *Apprendi* that any fact (other than a prior conviction) that increases the maximum authorized penalty is an element of the offense that must be charged in the indictment and proven to the jury beyond a reasonable doubt.

The notion that the drug quantity aggravators in §841(b) were mere sentencing factors represented a departure from settled law and appears to have sprung from *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).[1]

Apprendi clearly holds that the sentence-determining fact is an element of the offense and nothing less. Indeed, every Circuit to apply *Apprendi* to the quantity aggravators of §841 has held that they are elements of separate offenses which must be charged in the indictment.[2]

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[1] Before *McMillan*, drug quantity aggravators had been considered elements of separate offenses. *United States v. Crockett*, 812 F.2d 626, 629 (10th Cir. 1987); *United States v. Bazan*, 807 F.2d 1200, 1206 (5th Cir. 1986); *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986); *United States v. Moore*, 540 F.2d 1088, 1090 (D.C.Cir. 1976); *See* also, *United States v. Gibbs*, 813 F.2d 596, 606-08 (3rd Cir. 1987) (Aldisert, J., dissenting) (collecting cases holding quantity an element).

[2] *See United States v. Rogers*, 228 F.3d 1318, 1326-28 (11th Cir. 2000); *United States v. Nordby*, 225 F.3d 1053, 1056 (9th Cir. 2000); *United States v. Nance*, 236 F.3d 820, 823-25 (7th Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933-34 (8th Cir. 2000); *United*

The central point of the analysis required by *Jones*, *Castillo*, and *Carter* is that the inquiry into whether an aggravating fact is an element turns on the structure and effect of all the statutory language, not on what the legislators called the fact. *Castillo*, 530 U.S. at 125; *Jones*, 526 U.S. at 223. Statutory construction focuses not "on speculation as to the internal thought processes" of the legislators, but on the text, the structure, and the effect of the statutory language. *Carter*, 530 U.S. at 271.

Further, these factors must be scrutinized within the context of the "constitutional doubt" principle: where a statute is susceptible of two constructions; but one would raise a grave constitutional question, the court must adopt the interpretation that would avoid the constitutional issue. *Jones*, 526 U.S. at 240. *Castillo*, 530 U.S. at 129. Now that *Apprendi* has been decided, the question is no longer one of constitutional doubt but of avoiding certainly unconstitutional interpretation.

The focus on the text, structure, and effect of the statutory language as well as whether that effect is constitutional, requires this Court to hold, as a matter of

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States v. Flowal, 234 F.3d 932, 938 (6th Cir. 2000). *See* also, *United States v. Moreno*, 2000 WL 1843232 (S.D.N.Y. 2000) (Sotomayer, J.). *United States v. Strayhorn*, 250 F.3d 462, 467-68 (6th Cir. 2001); *United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001); *United States v. Eirby*, 262 F.3d 31, 36 (1st Cir. 2001); The Government in *United States v. Thomas*, 274 F.3d 655, 668 (2nd Cir. 2001) acknowledged this principle. The Third Circuit failed to follow its own precedent which had come down two days earlier in an en banc decision, *United States v. Vasquez*, 271 F.3d 93, 96 (3rd Cir. 2001).

statutory construction, that the drug quantity aggravators in §841 are elements of separate offenses.

Nowhere in §841 did Congress expressly provide that the drug types and quantity thresholds were mere sentencing enhancers, as opposed to elements. *See Jones*, 526 U.S. at 232-33 (Congress is unlikely to depart from past practice without making a point of saying so); *Castillo*, 530 U.S. at 124 (statute's literal language is neutral); *See* also *Almendarez-Torres v. United States*, 523 U.S. 224, 249 (1998) (Scalia, J., dissenting). The fact that the quantities with escalating penalties are set forth under the subheading "Penalties" does not make them mere sentencing factors if they function as elements. *Castillo*, 530 U.S. at 125. The "Penalties" subsection completes the "Unlawful Acts" section, which in turn requires reference to the definitions. Thus, to determine what the offense is, it is necessary to read several subsections, not only those called "Unlawful Acts." *Cf. Jones*, 526 U.S. 232-33 (the "look" of the statute, describing the "obnoxious behavior" in one section and escalating penalties in another was not a reliable guide where penalty sections completed the offense).

Most importantly, the quantity aggravators call for "steeply higher penalties" from a maximum of 5 years, to 20 years to life. This Court concluded in *Jones* and *Castillo* that the structure of sharply escalating penalties attached to factors made them more likely to be elements. *Jones*, 526 U.S. at 233; *Castillo*, 530 U.S. at 127. Finally, interpreting the statute in such a way to avoid constitutional invalidity requires the Courts to construe the quantity aggravators as elements of separate offenses. *Jones*, 526 U.S. at 239; *Castillo*, 530 U.S. at 124.

It is now beyond preadventure, both as a matter of statutory construction and constitutional analysis as required under *Apprendi*, that the drug quantity aggravators that increase the statutory penalty ranges in §841 are elements of separate offenses. Indeed, this was the law prior to *McMillan*. This Court in *Apprendi* put an end to the ten years of drift that ensued in the wake of *McMillan*. This Court simply restored the long standing principles fundamental to the common law and the Constitution. *See Apprendi*, 530 U.S. at 518 (Thomas, J., concurring) ("Today's decision, far from being a break from the past, marks nothing more than a return to the *status quo ante*").

The Third Circuit's failure to address this issue violates case precedent from this Court as well as from other Circuit Courts of Appeal.

6. This Court has repeatedly said that in matters of Federal Law, a Trial Court's jurisdiction is presumed **NOT** to exist unless it can be shown from the record, or as in the instant case from the Indictment that it does have jurisdiction. *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226 (1887).

As is clearly evident from the face of the indictment, in the instant case, there was a failure to rebut the presumption that federal jurisdiction did ***not*** exist to try the Petitioner for the offenses charged in the indictment. Not only did the indictment ***fail*** to aver all the essential elements of the offenses charged, which is in itself jurisdictional, it also failed in the first instance to assert either Federal territorial or subject matter jurisdiction. Thus, the

District Court was without jurisdiction to try the Petitioner, pass sentence, and enter a Judgment of Conviction and to order the Petitioner incarcerated.

Under the Federal system the "states possess primary authority for defining and enforcing criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). When Congress passes legislation criminalizing conduct already denounced as criminal by the states, it effects a "change in the sensitive relation between Federal and State criminal jurisprudence." *United States v. Enmons*, 410 U.S. 396, 411-12 (1973) quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

This distinction has been expressed repeatedly in numerous decisions from this Court. It has been stated that:

> "[U]nlike the reserved police powers of the States which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the commerce clause." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981).

The notion that Congress gave itself plenary power over controlled substances through its Commerce Clause power is not supported by case precedent from this Court where it has been held that: "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel, supra.*, at p. 311.

More significant is the part which the judiciary plays in the decision making process about the application of the Commerce Clause to the particular activity involved. This Court has said:

> "Whether particular operations affect interstate commerce sufficiently to come under the Constitutional power to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this court." *Heart of Atlanta Motel v. United States*, 370 U.S. 241, 273 (1964).

In the instant case the indictment charged the Petitioner with offenses under 21 U.S.C. §841, 21 U.S.C. §860 and 21 U.S.C. §846. Neither of these statutes is a self contained statute specifying the necessary predicate federal jurisdictional elements.

The indictment in the instant case did not allege an interstate commerce nexus, thus making it defective and Constitutionally infirm, therefore depriving the District Court of subject matter Jurisdiction.

Congress knows how to draft a statute that reaches the full extent of its commerce power. When Congress "wants to bring aspects of commerce within the full sweep of its constitutional authority, it maintains its purpose by regulating not only 'commerce,' but matters which 'affect' . . . interstate commerce." *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944).[3]

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[3] *See* also *NLRB v. Reliance Oil Corp.*, 371 U.S. 224, 226 (1963) and *United States v. American Bldg. Maint. Indus.*, 442 U.S. 271, 279-80 (1975) for discussions of the jurisdictional breadth of the Commerce Clause under the Constitution.

When enacting Title 21 and codifying Chapter 13 offenses, Congress knew how to write federal jurisdictional requirements under its commerce power into a particular provision of the Act. For example, in 21 U.S.C. §863 they stated:

> "It is unlawful for any person . . . (2) to use the mails, or any other facility of interstate commerce to transport drug paraphenalia;"

Consequently, charges for violations under §863 must allege the "use of the mails, or any other facility of interstate commerce" as an essential element of the offense in order to establish subject matter jurisdiction for the district courts to proceed even within the above stated exclusive territorial jurisdiction of the United States as specified in 21 U.S.C. §802(28) and 18 U.S.C. §7.

Sine Title 21 §§841, 846, and 860 offenses may be alleged ***without*** an interstate commerce nexus within Congress' limited and special jurisdiction delineated in 18 U.S.C. §7 (and not within the 50 states) the charging instrument, as in the instant case, ***must,*** as a matter of law, **allege an interstate commerce nexus** for acts committed within the territorial jurisdiction of any of the 50 states.

In the instant case, the term "interstate commerce" is not even mentioned anywhere in the indictment. Thus, the primary jurisdictional element required to obtain federal subject matter jurisdiction under Congress' Commerce Clause Power is completely missing. This rendered the indictment Constitutionally infirm. Furthermore, of all the offenses alleged in the indictment, not one of the Counts asserts how any of the acts (1) had any substantial

affect on interstate commerce, (2) made use of the channels of interstate commerce, or (3) impaired or hindered the instrumentalities of interstate commerce. *See Perez v. United States*, 402 U.S. 146, 150 (1971).

Notwithstanding the indictment's failure to allege primary federal subject matter jurisdiction, each count of the indictment failed to allege the essential elements necessary to give the District Court subject matter jurisdiction for each of the offenses charged.

The issue presented to this Court distills down to two succinct points of law. From a reading of 21 U.S.C. §801, Congress either intended that Chapter 13 offenses be enforced ***only*** within the Constitutional territorial boundaries of its exclusive legislative power, or it intended to enforce Chapter 13 offenses within ***both*** the territory of its exclusive legislative power ***and*** under the subject matter of its Commerce Clause Power within the 50 states. If this Court accepts the former premise, there is no Constitutional Federal Jurisdcition in the instant case whatsoever, in that each and every one of the alleged acts occurred within the territorial jurisdiction of one of the several states, namely the Commonwealth of Pennsylvania. If the latter premise is adopted, the indictment was required to allege an **interstate commerce nexus** for all counts in the indictment to provide the District Court with subject matter jurisdiction. The indictment failed to aver such allegations. Accordingly, in either instance, the District Court never acquired subject matter jurisdiction or any jurisdiction over the Petitioner.

There is the need for the charging papers to contain the requisite statutory provision for the indictment to be valid. This concept is firmly rooted in this Court's authority where it has never been suggested that "Congress can ignore the requirement that some connection with interstate commerce be established as a basis for conviction of a federal crime when the power of Congress to enact the statute is derived from the Commerce Clause." *United States v. Bass,* 434 F.2d 1296, 1300 (2nd Cir. 1970), aff'd *United States v. Bass,* 404 U.S. 336 (1971).

In the instant case, where Congress has enacted a criminal statute pursuant to its Commerce Power, either an adverse effect, relation to, or use of interstate commerce is an element of the crime and is a requirement which ***must*** be pled in the indictment. *Mortensen v. United States,* 322 U.S. 369 (1944).

As the Petitioner argued below, it is far more rudimentary than just the argument that there is lack of jurisdiction. The failure to apprise the accused of the charges undercuts his/her Fifth and Sixth Amendment rights. *Russell v. United States,* 369 U.S. 749, 763-65 (1962).

The Petitioner cited to the Third Circuit recent authority from both the Third Circuit and Second Circuit on this point. In the case of *United States v. Tran,* 234 F.3d 798 (2nd Cir. 2000), the Second Circuit stated:

> "If the district court acts beyond its jurisdiction[4] by trying, accepting a guilty plea from, convicting or sentencing a defendant for an offense not

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[4] In both *Tran* and *Spinner, supra.,* the Second and Third Circuits indicated that this jurisdictional defect implicated Fifth Amendment concerns relative to being charged by a Grand Jury. Both cases cited to *Ex Parte Bain, supra., and Stirone v. United*

> charged in the indictment, this Court must notice such error and act accordingly to correct it, regardless of whether the defendant has raised the issue." 234 F.3d at p. 809. Accord, *United States v. Spinner*, 180 F.3d 514 (3rd Cir. 1999).

The Third Circuit refused to consider this authority in deciding the Petitioner's Direct Appeal.

7. The Decision of the Third Circuit warrants review by this Court. Aside from the inherent importance of the questions that have been presented, the decision below conflicts with other Circuit decisions subsequent to *Apprendi*, and the disposition below conflicts directly with *Apprendi*.

Unless this Court grants review in the instant case, the decision by the Third Circuit will represent a departure from the recent case precedent of *Apprendi* and will undermine the Petitioner's Fifth and Sixth Amendment rights as presented above.

States, supra., for authority for this proposition. Yet no relief or consideration was given to these arguments.

CONCLUSION

Based upon the above noted authority, the Petition for Writ of Certiorari should be granted.

Dated: February 18, 2002

Respectfully submitted,

DOMINIC DIGREGORIO
52661-066 Unit F
Federal Correctional Institution-
McKean
P.O. Box 8000
Bradford, PA. 16701

APPENDIX A

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-4113

UNITED STATES OF AMERICA

v.

DOMINIC DIGREGORIO,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 99-cr-00144)
District Judge: Hon. Stewart Dalzell

Submitted Under Third Circuit LAR 34.1(a)
September 21, 2001

Before: SLOVITER, NYGAARD, and
McKEE, *Circuit Judges*

(Filed October 11, 2001)

MEMORANDUM OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Appellant Dominic DiGregorio was convicted by a jury of one count of conspiracy to manufacture and distribute methamphetamines, in violation of 21 U.S.C. § 846, two counts of distributing more than 100 grams of methamphetamines, in violation of 21 U.S.C. § 841(a)(1), and two counts of possessing one gallon of Phenyl-2-

Propanone ("P2P") with intent to manufacture methamphetamines, in violation of 21 U.S.C. § 841(a)(1). He now appeals his conviction, raising the following arguments: (1) the District Court lacked jurisdiction because the indictment failed to allege an essential element of the offense; (2) the District Court abused its discretion in allowing evidence of prior bad acts; and (3) the record sufficiently establishes that his trial counsel provided ineffective assistance of counsel. Because we write solely for the parties and not for publication, we need not set forth a detailed recitation of the background for this appeal and will limit our discussion to the resolution of the issues presented[1].

A. On March 17, 1999, a federal grand jury returned a seven-count indictment against DiGregorio which alleged various drug conspiracy and trafficking violations. A trial was held from November 12, 1999 to November 19, 1999. At the trial, the government presented the testimony of Anthony Palermo, an alleged co-conspirator, who described how he obtained quantities of methamphetamine from DiGregorio and distributed the drugs to other people on several occasions. Supp.

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[1] The government has requested that we dismiss the appeal on the ground that DiGregorio failed to file his notice of appeal within 10 days of the entry of the criminal judgment as required by Fed. R. App. P. 4(b)(1). In response, DiGregorio submitted a declaration of mailing stating that he placed the notice of appeal in the prison's mailbox within the required 10 days. The government has not contested DiGregorio's declaration which satisfies the prisoner mailbox rule. *See* Fed. R. App. P. 4(c)(1). Therefore, we will confine our consideration to the merits of the case.

App. at 3-4. Another alleged co-conspirator, John A. Renzulli, testified that he obtained P2P on several occasions for DiGregorio in order to manufacture methamphetamine. John R. Renzulli, the cousin of John A. Renzulli, then testified on how he helped deliver P2P to DiGregorio's residence in Philadelphia.

Federal Bureau of Investigations ("FBI") agents testified that they detained Palermo after one drug transaction, obtained Palermo's cooperation with their investigation, and recorded a conversation between Palermo and DiGregorio at DiGregorio's residence during which Palmero turned over $10,500 to DiGregorio. After Palermo left, the FBI agents conducted a consensual search of DiGregorio's residence and recovered the $10,500 and a tally sheet which allegedly listed drug sales.

During the trial, the government moved to admit evidence pursuant to Fed. R. Evid. 404(b) of uncharged drug transactions between DiGregorio and John R. Renzulli prior to the conduct charged in the indictment. After the parties filed briefs on the motion, the District Court ruled that the evidence could be admitted because it tended to prove the existence of a plan, knowledge, identity, and the absence of mistake or accident. App. at 53-54. However, the court instructed the jury in the charge of the court: "[Y]ou may not use this evidence to conclude that because the defendant committed the other acts, he must have also committed the acts charged in the Indictment." App. at 56.

On November 19, 1999, the jury found DiGregorio guilty of five of the counts of the indictment. On

November 16, 2000, the District Court sentenced DiGregorio to 100 months imprisonment, 5 years supervised release, a fine of $25,000 and a special assessment of $500. DiGregorio filed a timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

On appeal, DiGregorio first argues that the District Court lacked jurisdiction because the indictment failed to allege an essential element of the drug offenses, namely that interstate commerce was affected. Though DiGregorio failed to raise this issue at his trial, we have recognized that "[f]ailure of an indictment sufficiently to state an offense is a fundamental defect . . . and it can be raised at any time." *United States v. Wander*, 601 F.2d 1251, 1259 (3d Cir. 1979) (citing Fed. R. Crim. P. 12(b)(2)). Because this issue involves questions of law, our review is plenary. *See United States v. Markus*, 721 F.2d 442, 443 (3d Cir. 1983).

DiGregorio bases his argument on a strained interpretation of the Commerce Clause and the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), where the Court held that the Gun-Free School Zones Act, 18 U.S.C. § 922(q), was unconstitutional because the prohibited activity – possession of a gun within 1,000 feet of a school – did not affect interstate commerce. DiGregorio contends that after *Lopez*, the federal courts may no longer presume that an interstate commerce nexus exists but rather must consider each offense's nexus with interstate commerce. He therefore suggests that interstate commerce is an essential element of every federal criminal offense and must be pled in the indictment. He contends that the need to do so is especially present in his case, because the drug trafficking

statutes do not specify "the necessary predicate federal jurisdictional elements," Br. of Appellant at 22, and because the congressional findings at 21 U.S.C. § 801 are subject to varying interpretations, *see* Br. of Appellant at 17-19.

We reject this argument. First, neither *Lopez* nor any of our cases hold that interstate commerce is an essential element of the federal drug trafficking offenses that must be pled in the indictment. Our decision in *United States v. Spinner*, 180 F.3d 514 (3d Cir. 1999), *cert. denied*, 530 U.S. 1221 (2000), on which DiGregorio relies, is inapposite. In that case, we vacated the defendant's conviction for access device fraud, 18 U.S.C. § 1029(a)(5), because the indictment failed to plead a nexus with interstate commerce. However, that statute made effect on interstate commerce an element of the offense as it explicitly prohibited access device fraud "if the offense affects interstate or foreign commerce." 18 U.S.C. § 1029(a). The drug trafficking statutes do not contain a similar requirement.

Next, to the extent that DiGregorio is challenging the constitutionality of the drug trafficking statutes, he is also mistaken. After *Lopez* was decided, we expressly upheld the constitutionality of the Drug-Free School Zones Act, 21 U.S.C. § 860, in *United States v. Orozco*, 98 F.3d 105, 107 (3d Cir. 1996). In doing so, we recognized that "[a] large interstate market exists for illegal drugs" and that "Congress has the power to regulate that market just as it has the power to regulate food and drugs in general." *Id.* Indeed, we noted that "Congress expressly found that drug trafficking affected interstate commerce." *Id.* (citing 21 U.S.C. § 801). Congress acted within its commerce

power to enact the drug trafficking statutes and there is no additional requirement to allege a nexus to interstate commerce in each drug trafficking count.

DiGregorio then argues that the District Court erred in allowing the government to present evidence of prior bad acts under Fed. R. Evid. 404(b). We review for abuse of discretion. *See United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992). The evidence in question involved John R. Renzulli's testimony of his purchase of approximately 1/4 pound of methamphetamine from DiGregorio on two separate occasions during the summer of 1994 or 1995. Supp. App. 171-175. The government argued that this evidence demonstrated the background of the conspiracy, established DiGregorio's knowledge of the purpose of the subsequent delivery of P2P to him by Renzulli, and negated any potential defense of lack of knowledge, accident, or mistake by DiGregorio. App. at 43. The District Court considered the four-part test for Fed. R. Evid. 404(b) admissibility set out in *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988), and then admitted the evidence. After reviewing the record, we conclude that the District Court did not abuse its discretion in doing so.

Lastly, DiGregorio argues that the record sufficiently establishes that his trial counsel was ineffective. We have held that "[i]neffective assistance of counsel claims are not generally entertained on direct appeal." *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991). However, a narrow exception to this rule exists "[w]here the record is sufficient to allow [a] determination of ineffective assistance of counsel" and "an evidentiary hearing to develop the facts is not needed." *Id.* DiGregorio argues

that his trial counsel, Louis Busico, failed to file a motion for judgment of acquittal under Fed. R. Crim. P. 29, failed to discuss evidence and trial strategy with him before and during the trial, and otherwise failed to prepare sufficiently. Because these allegations require an evidentiary hearing to develop the facts, the proper forum for pursuing DiGregorio's ineffective assistance of counsel claim is in a federal habeas proceeding brought under 28 U.S.C. § 2255. *See United States v. Theodoropoulos*, 866 F.2d 587, 598 (3d Cir. 1989), *overruled on other grounds*, 76 F.3d 526 (3d Cir. 1996). Therefore, we decline to consider his ineffective assistance of counsel claim here.

For the foregoing reasons, we will affirm the District Court's judgment of conviction.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores Sloviter
DOLORES SLOVITER
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	CRIMINAL NO. 99-144
	DATE FILED: 3/17/99
v.	VIOLATIONS:
DOMINIC DiGREGORIO	21 U.S.C. § 846 (Conspiracy to manufacture and distribute methamphetamine – 1 Count) 21 U.S.C. § 841(a)(1) (Distribution of methamphetamine – 2 Counts) 21 U.S.C. § 841(a)(1) (Possession of Phenyl-2-Propanone with intent to manufacture methamphetamine – 3 Counts) 21 U.S.C. § 841(d)(1) (Possession of listed chemical with intent to manufacture methamphetamine – 1 Count) 18 U.S.C. § 2 (Aiding and Abetting) 21 U.S.C. § 853 (Criminal Forfeiture)

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

At all times relevant to this indictment:

CONSPIRACY

1. From on or about January 1997 to on or about March 25, 1998, at Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendant

DOMINIC DiGREGORIO

did knowingly and wilfully conspire, combine, confederate and agree with other persons known and unknown to the grand jury, to manufacture, to possess with intent to distribute within 1,000 feet of a school, and to distribute more than 1 kilogram of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II non-narcotic controlled substance, in violation of Title 21, United States Code, Sections 860 and 841(a)(1).

MANNER AND MEANS

1. It was part of the conspiracy that defendant DOMINIC DiGREGORIO and other persons known to the grand jury aided and abetted the manufacture of more than 30 pounds of methamphetamine at clandestine laboratory sites located in the Eastern District of Pennsylvania and elsewhere.

It was a further part of the conspiracy that:

2. Defendant DOMINIC DiGREGORIO and others known to the grand jury obtained, sold and distributed for profit pound, partial pound and multi-pound quantities of methamphetamine manufactured by other members of the conspiracy at various clandestine laboratory sites within the Eastern District of Pennsylvania and elsewhere, including at 1404 Dyke Branch Road, Dover Delaware, 1721 S. Water Street, Philadelphia, Pennsylvania,

The Greenwood Cemetery in Philadelphia, Pennsylvania, and at a location in the Pocono Mountains in Northeast Pennsylvania.

3. Defendant DOMINIC DiGREGORIO obtained gallon quantities of phenyl-2-propanone ["P2P"], and monomethylamine ["methylamine," "water", and "40"], precursors used in the illicit manufacture of methamphetamine, from other coconspirators known to the grand jury for use in the clandestine manufacture of methamphetamine in Philadelphia, Pennsylvania and elsewhere.

4. Defendant DOMINIC DiGREGORIO from early 1997 through March 25, 1998 periodically manufactured methamphetamine at a clandestine laboratory located in the Pocono Mountains in Northeast Pennsylvania, using from one quart to one gallon of P2P, resulting in yields of between 2 and 10 pounds of "pure" methamphetamine per "cook".

5. Defendant DOMINIC DiGREGORIO distributed pound quantities of methamphetamine to co-conspirators known to the grand jury in return for payments of $10,500 per pound.

6. Defendant DOMINIC DiGREGORIO periodically received multi-pound quantities of methamphetamine from coconspirators known to the grand jury involved in a conspiracy to manufacture and distribute more than 100 pounds of methamphetamine in the Eastern District of Pennsylvania and the District of Delaware.

7. Defendant DOMINIC DiGREGORIO distributed pound quantities of methamphetamine from his residence at 2602 S. Sartain Street, Philadelphia, Pennsylvania.

8. Defendant DOMINIC DiGREGORIO received deliveries of gallon quantities of precursors to be used in the manufacture of methamphetamine, including P2P and methylamine, at his residence at 2602 S. Sartain Street, Philadelphia, Pennsylvania.

9. Defendant DOMINIC DiGREGORIO kept a tally sheet setting forth the identity of coconspirators, and the amounts of money owed and paid for quantities of P2P, methylamine and methamphetamine he received.

OVERT ACTS

In furtherance of the conspiracy and to accomplish its objects, the following overt acts, among others, were committed in the Eastern District of Pennsylvania and elsewhere:

1. In or about February 1997, DOMINIC DiGREGORIO received one gallon of P2P and five gallons of monomethylamine, from coconspirator John A. Renzulli at Downtown Auto 630 Federal Street, Philadelphia, Pennsylvania which DiGREGORIO intended to use in the manufacture of methamphetamine.

2. In or about February 1997, DOMINIC DiGREGORIO manufactured approximately 6 1/2 pounds of methamphetamine at a clandestine laboratory in Pennsylvania using P2P and monomethylamine supplied by coconspirator John A. Renzulli.

3. In or about February 1997, DOMINIC DiGREGORIO stored approximately 6 1/2 pounds of methamphetamine at his residence at 2602 S. Sartain Street, Philadelphia, Pennsylvania and permitted John A. Renzulli to retrieve the methamphetamine from that location for further distribution and as a partial payment toward the $37,000 debt DiGREGORIO owed for the one gallon of P2P and five gallons of monomethylamine supplied by coconspirator John A. Renzulli.

4. In or about February 1997, coconspirator John A. Renzulli retrieved approximately 6 1/2 pounds of methamphetamine from DiGREGORIO's residence at 2602 S. Sartain Street, Philadelphia, Pennsylvania and subsequently distributed it to other persons known to the grand jury.

5. In or about February 1997, DOMINIC DiGREGORIO traveled to Italy for the intended purpose of locating a source of Phenyl-2-Propanone ["P2P"], a precursor used in the manufacture of methamphetamine, to be shipped via wine bottles from the source site in Italy to the United States to be used by DiGREGORIO and other coconspirators known to the grand jury to clandestinely manufacture methamphetamine in the Eastern District of Pennsylvania, the District of Delaware and elsewhere, for distribution and sale. This trip was financed with monies provided to DiGREGORIO by coconspirator John A. Renzulli.

6. In or about March 1997, DOMINIC DiGREGORIO returned to the United States from Italy after he and

another coconspirator known to the grand jury determined that they would not be able to obtain P2P in Italy for transshipment to the United States.

7. On or about January 16, 1998, defendant DOMINIC DiGREGORIO distributed approximately 1 pound of methamphetamine to coconspirator Anthony Palermo at 2602 S. Sartain Street, Philadelphia, Pennsylvania.

8. On or about January 16, 1998, coconspirator Anthony Palermo distributed approximately 1 pound of methamphetamine obtained from defendant DOMINIC DiGREGORIO to a cooperating witness known to the grand jury at the Hechinger store parking lot in Woodlyn, Pennsylvania in return for $10,500 in United States currency.

9. On or about January 16, 1998, after completing the sale and distribution of the pound of methamphetamine to a cooperating witness, coconspirator Anthony Palermo immediately returned to the residence of defendant DOMINIC DiGREGORIO at 2602 S. Sartain Street, Philadelphia, Pennsylvania. Anthony Palermo turned over to defendant DOMINIC DiGREGORIO $10,500 in United States currency, from which DiGREGORIO paid $500 to Palermo.

10. In or about early February 1998, defendant DOMINIC DiGREGORIO received approximately 1 pound of methamphetamine from coconspirator John A. Renzulli that had been recently manufactured at a clandestine laboratory at the Greenwood Cemetery in Philadelphia, Pennsylvania by Renzulli and other coconspirators known to the grand jury.

11. In or about early February 1998, defendant DOMINIC DiGREGORIO "cut" the one pound of methamphetamine received from coconspirator John A. Renzulli to produce 2 pounds of methamphetamine for further distribution and sale.

12. In or about mid-February 1998, defendant DOMINIC DiGREGORIO received 1 gallon of P2P and 5 gallons of methylamine from coconspirator John A. Renzulli, at DiGREGORIO's residence at 2602 S. Sartain Street, Philadelphia, Pennsylvania. The agreed price for the P2P, supplied on credit, was $35,000; the agreed price for the methylamine, also supplied on credit, was $2,500 per gallon.

13. In or about mid-March 1998, defendant DOMINIC DiGREGORIO received 1 gallon of P2P from coconspirator John R. Renzulli, at the direction of coconspirator John A. Renzulli, at DiGREGORIO's residence at 2602 S. Sartain Street, Philadelphia, Pennsylvania. The agreed price for the P2P, supplied on credit, was $35,000.

14. On or about March 25, 1998, defendant DOMINIC DiGREGORIO distributed approximately 1 pound of methamphetamine to coconspirator Anthony Palermo at 2602 S. Sartain Street, Philadelphia, Pennsylvania.

15. On or about March 25, 1998, coconspirator Anthony Palermo distributed approximately 1 pound of methamphetamine obtained from defendant DOMINIC DiGREGORIO to a cooperating witness known to the grand jury at the Hechinger store parking lot in Woodlyn,

Pennsylvania in return for $10,500 in United States currency.

16. On or about March 25, 1998, defendant DOMINIC DiGREGORIO possessed at 2602 S. Sartain Street, Philadelphia, Pennsylvania approximately one gallon of methylamine, a drug trafficking tally sheet, as well as $10,500 in United States currency which had been supplied by the FBI to a cooperating witness on March 25, 1998 in order to complete the purchase of 1 pound of methamphetamine from coconspirator Anthony Palermo.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

In or about February, 1997, at Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendant

DOMINIC DiGREGORIO

did knowingly and intentionally possess with intent to manufacture, and did aid and abet and willfully cause the possession, with intent to manufacture methamphetamine, of approximately one (1) gallon of a mixture or substance containing a detectable amount of Phenyl-2-Propanone ["P2P"], a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 16, 1998, at Philadelphia, in the Eastern District of Pennsylvania, defendant

DOMINIC DiGREGORIO

did knowingly and intentionally distribute and did aid and abet the distribution of, more than 100 grams, that is, approximately one pound of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

In or about February 1998, at Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendant

DOMINIC DiGREGORIO

did knowingly and intentionally possess with intent to manufacture, and did aid and abet and willfully cause the possession, with intent to manufacture methamphetamine, of approximately one (1) gallon of a mixture or substance containing a detectable amount of Phenyl-2-Propanone ["P2p"], a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

In or about March, 1998, at Philadelphia, in the Eastern District of Pennsylvania, and elsewhere, defendant

DOMINIC DiGREGORIO

did knowingly and intentionally possess with intent to manufacture, and did aid and abet and willfully cause the possession, with intent to manufacture methamphetamine, of approximately one (1) gallon of a mixture or substance containing a detectable amount of Phenyl-2-Propanone ["P2p"], a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 25, 1998, at Philadelphia, in the Eastern District of Pennsylvania, defendant

DOMINIC DiGREGORIO

did knowingly and intentionally distribute, and did aid and abet the distribution of, more than 100 grams, that is, approximately one pound of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 25, 1998, at Philadelphia, in the Eastern District of Pennsylvania, defendant

DOMINIC DiGREGORIO

did knowingly and intentionally possess, and did aid and abet and willfully cause the possession of, approximately one (1) gallon of monomethylamine, a listed precursor chemical used in the illicit manufacture of methamphetamine, with the intent to manufacture a controlled substance, that is, methamphetamine, a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

NOTICE OF FORFEITURE

THE GRAND JURY FURTHER CHARGES THAT:

As a result of the violations of Title 21, United States Code, Sections 846 and 841(a)(1), as set forth in this indictment, defendant

DOMINIC DiGREGORIO

shall forfeit to the United States of America pursuant to Title 21, United States Code, Section 853, the following property:

A. All property derived from any proceeds which defendant DOMINIC DiGREGORIO, obtained, directly or indirectly, as a result of these violations of Title 21 as charged in this indictment, including, but not limited to: 1) the sum of $10,500 in United States currency received by defendant DOMINIC DiGREGORIO for the distribution of one pound of methamphetamine to coconspirator Anthony Palermo on January 16, 1998, as charged in Count Two of this Indictment; 2) the sum of $12,714 in United States currency seized from defendant DOMINIC DiGREGORIO's residence and person at 2602 S. Sartain Street, Philadelphia, Pennsylvania on March 25, 1998;

B. All property owned by defendant DOMINIC DiGREGORIO which was used or intended to be used in any manner or part to commit or facilitate the commission of any of these violations, including but not limited to: 1) 2602 S. Sartain Street, Philadelphia, Pennsylvania, as described in the Philadelphia Office of Recorder of Deeds, Deed Book 730, page 520;

C. If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant DOMINIC DiGREGORIO,

1. cannot be located upon the exercise of due diligence;

2. has been transferred or sold to, or deposited with, a third party;

3. has been placed beyond the jurisdiction of the court;

4. has been substantially diminished in value; or

5. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p) to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

All pursuant to Title 21, United States Code, Section 853(a)(1), (2) and (p).

A TRUE BILL:

_____
FOREPERSON

/s/ Michael R. Stiles
MICHAEL R. STILES
United States Attorney

First Assistant U.S. Attorney

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-4113

UNITED STATES OF AMERICA

v.

DOMINIC DiGREGORIO

Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, NYGAARD, and McKEE, *Circuit Judges*

The petition for rehearing filed by

Appellant Dominic DiGregorio

in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ Dolores Sloviter
Circuit Judge
DOLORES SLOVITER

Dated: Nov. 28, 2001
NOV 28 2001

APPENDIX D

21 U.S.C. 841. Prohibited acts A.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving. . . .

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of. . . .

(IV) any compound, mixture, or preparation which contains any quanity of any of the substances referred to in subclauses (I) through (III). . . .

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual or both. . . .

(B) In the case of a violation of subsection (a) of this section involving. . . .

(ii) 500 grams or more of a mixture or substance containing a detectable amount of. . . .

(IV) any compound, mixture, or preparation which contains any quanity of any of the substances referred to in subclauses (I) through (III). . . .

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	
DOMINIC DiGREGORIO	:	NO. 99-144

PHILADELPHIA, PENNSYLVANIA
MONDAY, NOVEMBER 15, 1999

BEFORE: HON. STEWART DALZELL, J.
(And a Jury)

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* * *

[767] CHARGE OF THE COURT

25, 1998.

Section 841(a)(1) provides, in part, that:

"It shall be unlawful for any person knowingly or intentionally to distribute a controlled substance."

In order to sustain its burden of proof for the crime of distribution of a controlled substance as charged in Counts Three and Six of the Indictment, the Government must prove the following two essential elements beyond a reasonable doubt.

One: The defendant, Dominic DiGregorio, knowingly and intentionally distributed the controlled substance described in the Indictment;

And, Two: At the time of such distribution, the defendant knew that the substance distributed was a controlled substance.

I've already instructed you on what it means to do something "knowingly" or "intentionally."

The term "to distribute," as used in these instructions, means to deliver or to transfer possession or control of something from one person to another.

The term "to distribute" includes the sale of something by one person to another.

Again, the evidence in this case need not [768] prove the actual amount of the controlled substance that was part of the alleged transaction or the exact amount of the controlled substance alleged in the Indictment as distributed by the defendant.

The Government must prove beyond a reasonable doubt, however, that a measurable amount of a controlled substance was, in fact, knowingly and intentionally distributed by the defendant Dominic DiGregorio.

Counts Three and Six also charge the defendant with aiding and abetting the distribution of more than 100 grams of a substance containing a detectable amount of methamphetamine. I've already instructed you on the law of aiding and abetting.

Count Seven.

Count Seven charges that, on or about March 25, 1998, in Philadelphia, in the Eastern District of Pennsylvania, defendant Dominic DiGregorio did knowingly and intentionally possess and did aid and abet and willfully cause the possession of approximately one gallon of monomethylamine, a listed precursor chemical used in the illicit manufacture of methamphetamie, with the intent to manufacture a controlled substance, that is methamphetamine, a Schedule II non-narcotic controlled substance, in

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